IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO. 970 OF 1998

Motillal Mahadev Sharma)
(since deceased))
1. Gangawati Motilal Sharma)
2. Prakash Motilal Sharma)
3. Leela Motilal Sharma)
4. Pushpa Motilal Sharma)
5. Vijay Motilal Sharma)
6. Usha Motilal Sharma)
7. Sandhya Motilal Sharma)
8. Jayshree Motilal Sharma)
(all being legal heirs and)
representatives of the)
deceased, having their)
address at plot No. A/40)
Dabholkar Adds,Parel Tank)
Road, Bombay - 38.)..... Appellants.

versus

The Municipal Corporation of)
Greater Bombay.) ..... Respondents.

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Mr. V.M. Bhardwaj with Mr. Umesh Yerunkar for the applicant.
Mr. A.Y. Sakhare Sr. Counsel for BMC- Respondents.

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CORAM ; D.G. DESHPANDE, J.

DATED; 1ST APRIL, 2005.

ORAL JUDGMENT ;

1. Heard the advocates for the appellants and the respondent. Both of them in addition have given their written arguments. I have gone through the arguments

and also the entire record and documents proved before the trial court.

2. This appeal is filed by the Plaintiffs against the judgment and decree of the 2nd Additional Principal Judge, City Civil Court, Bombay dated 21st August 1998, dismissing the suit of the plaintiff. The present appellants are legal heirs of the original plaintiff, and after his death they were brought on record.

3. It is to be noted at this juncture that the suit filed by the original plaintiff in 1979 came to be substantially amended after four years, in 1983, by introduction of a rider. There is a specific intention and the motive of the plaintiff in doing so upon which I will comment subsequently.

4. The suit, as originally filed, was in respect of residential structures situated on Plot No. A-40 at Dabholkar Adda, Bombay-38. Original plaintiff was residing there with his family members since 1971. The plot upon which the structures of the plaintiff was standing,belongs to Municipal Council. The monthly rent, according to the plaintiff, was Rs. 187.50/- and the plaintiff was paying rent to the defendant. A rough sketch plan was annexed to the plaint. This

rough sketch plan which is now in torn condition, shows only one structure at the centre and one structure at the north-east corner. No other structures are shown. According to the plaintiff, the remaining portion of the plot was used by him for doing his scrap business since 1971. The plaintiff has not taken licence for doing the scrap business. He was prosecuted for that by the defendant. This plot was originally let out by the defendant to M/s. Swan Metal Works but there were some eviction proceedings against the original tenant and order of eviction came to be passed on 28th March 1972. The plaintiff has contended that he subsequently learnt that he was also party to the eviction proceedings against the original tenant and therefore his occupation was considered as unauthorised by the defendant. The plaintiff therefore took up the matter with the defendant and alternatively requested for alternate accommodation. Initially the prayer for alternate accommodation was rejected and then according to the plaintiff, the defendant dropped the eviction proceedings and regularised the original plaintiff's occupation of the plot and accepted rent and taxes from the plaintiff.

5. Then again in 1976 the defendant intended to shift the plaintiff from the suit plot, when the original

plaintiff demanded alternate accommodation. He was informed by the defendant to contact them for alternate accommodation by their letter dated 1st July 1976. However, according to the plaintiff the alternate accommodation was not given and he continued to occupy the plot with his family members in the structure and was doing business. He also paid taxes and rent.

6. Thereafter, according to the plaintiff one Shridharkar of the defendant claiming to be the Executive Officer, came on the suit plot on 24-5-1979 and threatened to demolish the residential premises of the plaintiff and to take possession of the plot. According to the plaintiff no notice under section 351 of 488 was served by the BMC upon him. But the plaintiff was informed that it was an execution of the original order in eviction proceeding No. F.S.187/72. Thereafter in this background the plaintiff filed the suit for a declaration that the order dated 30th April 1979 in F.A. 187/72 was illegal, bad in law and also for consequential relief of injunction.

7. The suit of the plaintiff was strongly opposed by the defendant. They raised many contentions. First, according to them the suit was not maintainable and it was not proceeded with by statutory notice under

section 527 of the BMC Act. Secondly, according to them the eviction proceedings were considered against M/s Swan Metal Works and Mr. R.V.Tarphe who was concerned with the said Swan Metal Works were ordered to be evicted along with the original plaintiff by order dated 28-2-1972. The said Tarphe was given and provided alternate accommodation and the original plaintiff though not entitled was also offered alternative accommodation because he was a freedom fighter. Further, according to the defendant, the plaintiff was knowing about the eviction order dated 19-6-1972 but he did not file appeal which was provided under section 505 of the BMC Act.

8. In this background, the trial court framed three issues:

1) Whether the suit is maintainable for want of notice under section 527 of the BMC Act ?

2) Whether this court has jurisdiction to try this suit when alternate remedy was available under section 105(B) of the BMC Act ?

3) Whether the plaintiff proved that the eviction proceedings were bad and illegal in

law ?

The trial court gave negative findings in respect of all the three issues and dismissed the suit. Hence this appeal.

9. It was firstly contended by the advocate for the appellant that the suit should not have been dismissed for want of notice under section 527 of the BMC Act i.e. the statutory notice before institution of a suit, because the suit had to be filed in urgency. According to the plaintiff, on 25th or 26th May 1979 one Shridharkar, officer of the BMC threatened them that they would demolish the house and take forcible possession. Therefore the suit had to file in hurry to prevent the threat from being executed or materialised. The suit was infact filed on 25th May 1979 and therefore in the circumstances it was not necessary and obligatory on the part of the plaintiff to serve statutory notice under section 527. I find considerable force in this argument and submissions. There are rulings on this point that when the plaintiff wants to seek immediate relief from the court in the form of injunction, it is not necessary for him to issue statutory notice or wait till the statutory notice is served and the period prescribed under

section 527 of the Act is over. (to verify) Therefore the dismissal of the suit by the court on that count and with reference to that issue is not proper. The finding in that regard is required to be set aside.

10. So far as issue no.2 is concerned, on the basis of the averments in the written statement, it was firstly contended by the defendant that notice of eviction proceedings was served upon the plaintiff. Because the eviction proceedings and the order were against three persons namely (1) M/s. Swan Metal Works, (2) Rajaram Tarphe and (3) original Plaintiff Motilal Mahadev Sharma. However, according to the defendant, even if the said notice was not served upon the plaintiff, the plaintiff had applied for certified copy of the order of eviction. Witness no.1 for the defendant Mr. Subhash, Desk Superintendent in the department of the BMC, in his deposition has stated that the original plaintiff applied for the issue of certified copy of the order dated 28-12-1972 on 4-5-1973 and he paid charges for the same to BMC on 5-5-1973 and obtained copy. He produced the original application dated 4-5-1973. Therefore it was the contention of the BMC that even if for the sake or arguments, it is accepted that notice was not properly served upon the plaintiff, it cannot be said that the plaintiff was not aware of

the order. His application for certified copy of the order and his getting certified copy clearly shows that atleast at that juncture and at that point of time, he became aware of the order under challenge in the suit. However, even though the remedy by way of appeal is provided against such an order, the plaintiff did not file the appeal and therefore he had no right to file the suit to challenge the said order.

11. The trial court upheld the contention of the BMC in this regard as can be seen on the finding of issue no.2. The trial court held that the order was passed under section 105 (B) of the BMC Act and it was appealable under section 105(F). If therefore BMC Act has provided remedy for all those who had affected by such an order under section 105 (B) then it was necessary and obligatory upon them to challenge the said order by filing appeal. Admittedly the plaintiff did not file any such appeal and therefore from the facts proved namely that original plaintiff was aware of the impugned order from the date on which he applied for certified copy and/or from the date on which he got the certified copy but still he did not file the appeal provided by the statute and therefore the trial court rightly held that the original plaintiff having failed to challenge the said order by filing the appeal, had

no right to file suit and therefore the suit of the plaintiff was not maintainable.

12. In this regard the counsel for the appellant contended that warrant of possession was not issued as per the provisions of section 105(B) and therefore section 105 (F) did not apply. I am not in agreement with the submissions of the counsel for the appellant. The question was not of a particular form of warrant of possession, but the question was of the initial order of eviction. If the original plaintiff was aware of that order then it was necessary for him to file the appeal. But he chose not to file the appeal but file the suit. That too not upon getting certified copy but when in 1979 the officer of the BMC Shri Shridharkar came for executing the order. The plaintiff allowed a period of six years to elapse between the date of getting the certified copy on 4-5-1973 till 29-5-1979, the date of filing of the suit. He did not take any action after getting certified copy. He did not challenge the order for all the six years of period but filed the suit in 1979 as the case of emergency. When the statute has provided effective remedy and when the original plaintiff deliberately chose not to proceed with said effective remedy, then the trial court cannot said to have committed any wrong in giving the finding

against the plaintiff of issue no.2. I do not find any reason to interfere with this finding.

13. Now, if issue no.2 is held against the plaintiff by the trial court and if that finding has to be maintained for the reasons stated above, then it is not necessary to deal with the case of the plaintiff on merit. However, issue no.2 was not decided as a preliminary issue. But the issue further fulfledged the trial and therefore it will be proper to deal with the case of the plaintiff on merit, i.e. whether the eviction proceedings were bad and illegal in law.

14. I have already noted as to what was the case of the original plaintiff before amendment. That case was in respect of the residential structure of Plot No. A-40 where the plaintiff was residing with the members of his family. However, by amendment the plaintiff tried to seek the relief in respect of all the structures standing on Plot No.A-40. This amendment by way of rider was as under:

> "The suit Plot No.A-40 admeasuring 134 x 83 ft. equivalent to 1236 sq. yards or 1200 sq. meters as per the dimensions given in the sketch. The said structures admeasures

about 1200 ft. The structure on the north east corner and other structure is used by the plaintiff for self and members of his family for residential purposes."

15. As to what is the structure standing on the aforesaid plot, the report of the architect is important. It is Exh.Q, given by M/s. Gupte & Co. Registered Architect, Engineers and Surveyors. It is accompanied by sketch plan and 24 structures are noted by the said architect. They are spread all over the plot. Some of them had collapsed and some of them were became beyond repairs.

16. When the suit was filed by the original plaintiff before amendment, it will be clear that anxiety of the plaintiff was to protect his own residential structure and he filed the suit and claimed for injunction. It is clear that four years thereafter in order to exploit the situation to the best of his advantage, he amended the plaint seeking protection of all the 20 structures. Not a word is uttered by the plaintiff or the newly added plaintiffs as to how the plaintiff was concerned with the 20 structures, who built them, when they were built, and who are occupying the 20 structures and whether the plaintiff was owner of all the

structures and whether he was paying taxes for all the structures separately or collectively, and what was the relationship between the plaintiffs or the original plaintiff and the occupiers of those structures. It is pertinent to note that in the rough sketch map filed with the original plaintiff only two structures are shown and there is no reference or mention to other structures in the said map, nor it is there anywhere in the plaint. This is therefore nothing but a case where after succeeded in getting ad-interim order or interim order against the BMC, plaintiff amended the plaint to grab more and more property of the BMC and to claim injunction in respect of all the 24 structures.

17. A perusal of the original plaint as well as the amended plaint clearly shows that, what is claimed by the plaintiff is protection of his right on the basis of previous possession and nothing more. Plaintiffs had admitted that the plot was owned by the BMC and was originally let out by the defendant to M/s. Swan Metal Works. Plaintiffs also admitted that eviction proceedings were started against said M/s. Swan Metal Works and order was passed on 28th March 1972. However, nowhere in the plaint, the plaintiffs has stated as to in what capacity or in what right he came in possession of the property. He is not a tenant of

the BMC. There is no agreement between him and the BMC in that regard. He is not inducted by M/s. Swan Metal Works nor he had any concern with M/s. Swan Metal Works, and also there is no agreement between him and M/s. Swan Metal Works in that regard.

18. However, it appears that when the suit came for recording evidence, the plaintiffs i.e. newly added plaintiffs became aware of this lacuna in their case and pleadings. Therefore when Pushpa was examined as witness for the plaintiff, she tried to improve her case and she contended that her father, the original plaintiff was carrying on partnership business in the name and style of M/s. Swan Metal Works and this partnership was in existence till 1971 and thereafter it was dissolved. The plaint is totally silent in this regard and therefore this evidence of Pushpa has nothing but an intelligent improvement to overcome the defect in the pleadings. Even otherwise, if at all the original plaintiff was concerned with M/s. Swan Metal Works as a partner then the eviction order against M/s. Swan Metal Works is binding upon him. She should have challenge the said order by preferring appeal. But he has not done so and secondly the original plaintiff never asserted any correction with M/s. Swan Metal

Works in the original plaint.

19. Thirdly, according to the defendant, one Mr. Tarphe was concerned with M/s. Swan Metal Works and he was given alternate accommodation by the BMC because the suit plot was required by the Corporation for development as per reservation. Mr. Tarphe was in occupation and therefore he was shifted to Goregaon Kama Industrial Estate in the year 1975 as an alternate accommodation. Therefore if the original plaintiff was a partner of M/s. Swan Metal Works then alternate accommodation as given by BMC to Mr. Tarphe, and therefore, original plaintiff cannot claim any right, title or interest in the suit plot. If the original plaintiff was not a partner of M/s. Swan Metal Works then the evidence of Pushpa has to be rejected, firstly as an improvement, secondly as an after thought and thirdly because there is absolutely nothing in the form of documents to show that original plaintiff was a partner of M/s. Swan Metal Works.

20. I already referred to the case of the original Plaintiff in the original plaint and I have also noted and observed that plaintiff has not stated in what capacity or in what right he is occupying the premises. If he was a partner of M/s. Swan Metal Works, then

eviction order is passed against M/s. Swan Metal Works, and he is aware of that order because he applied for certified copy but did not prefer to appeal as provided by the BMC Act and therefore the suit is not maintainable. If he was not a partner of M/s. swan Metal Works, then he is a stranger and tress-passer but he is knowing about the eviction order and no appeal is filed by him and therefore also the suit is not maintainable.

21. Secondly, if he was not a partner of M/s. Swan Metal Works then alternate accommodation as provided to M/s. Swan Metal Works, i.e. to Mr. Tarphe the plaintiff ceases to have any right in and over the suit property. He has contended that the defendant regularised the plaintiff's accommodation and he has no documentary evidence to show that his illegal possession was regularised. Therefore on all count, the plaintiff has failed in this case both in the pleadings and also in the evidence.

22. However, it appears that the plaintiff in his pleadings has stated about previous possession simplicitor. But that too cannot be protected by granting injunction as prayed, because the eviction order was there against him. He was even offered

alternate accommodation pursuant to his prayer, may be as freedom fighter. Therefore since the Corporation decided to give alternate accommodation, the plaintiff lost all his right in the property, i.e. the rights arising out of possession simplicitor. Because no legal right over the property is claimed, asserted and proved by the plaintiff. It is true that number of documents produced to show that he was in possession but mere possession in the absence of any right does not give protection to the plaintiff particularly in all the circumstances mentioned above.

23. I have already observed and noted that the suit was filed for protection of residential structure on the said plot. But by amendment 24 structures noted by the architect of the plaintiff are tried to be protected without any right or without any iota of evidence about his right, title and interest over all other 22 structures i.e. including the residential structure of the plaintiff. Then it is not a suit filed by the original plaintiff in a representative capacity to protect the possession of all the 22 occupants. Pushpa, who was examined on behalf of all the plaintiffs, has tried to contend in her evidence that 12 rooms are there since long back on the suit land and all rooms belong to them. Some of the rooms

are of massonary walls having patra roofs and some are patra sheds. The rooms are independent. 1 plus 2 rooms out of 22 rooms is in her possession. This evidence clearly shows that the residential structure was 1 plus 2 and at the most by the amendment the plaintiff tried to get protection of all the 22 rooms with which he has no concern.

24. Then Pushpa has admitted in para 10 of her cross examination that she does not know who had constructed 22 rooms on the said plot. She admitted that in the map Exh.A only two structures were shown. She could not explain as to why other structures were not shown in the map. She also stated that whatever is shown in Exh.A is wrong and whatever stated in the rider of para 2 of the plaint is incorrect. She admitted that she does not have any documentary evidence to show that 22 rooms were in existence since long back on the suit plot.

25. The counsel for the appellant however strenuously and repeatedly urged that no notice of eviction was served either on M/s. Swan Metal Works or on Rajaram Tarphe or on the original plaintiff and the order was served upon on imaginary form. However the order of eviction which came to be subsequently passed was not

served on the original plaintiff as repeatedly stated above and therefore this contention of the plaintiff has no force at all. Thereafter the plaintiff again has contended that eviction proceedings were dropped subsequently. There is nothing on record to show that the eviction proceedings were dropped.

26. While deciding issue no.3 as stated above, the trial court has considered the oral evidence given by the plaintiff through Pushpa. Admittedly Pushpa at the time of this controversy was minor. She does not have any personal knowledge of many facts and aspects of the matter. All those aspects have been considered by the trial court at length. She however admitted thatin 1983 BMC have offered alternate accommodation to her father by letter dated 19-1-1983 Exh.4. Then she also admitted another letter of her father dated 23-5-1983 addressed by the original plaintiff to the ward officer in reply to the letter dated 19-1-1983 by which the original plaintiff requested the ward officer to consider his case sympathetically. Another letter dated 13-5-1983 Exh.5 of the BMC is placed on record to show that original plaintiff was not interested in the allotment of pitch offered to him and therefore a warning was given that necessary again is deem fit

would be taken against the original plaintiff.

27. The evidence of Pushpa is therefore mainly based on hearsay matters. She has pleaded ignorance in many vital issues. As against this there is positive and concrete evidence of BMC coupled with the documents namely allotment of alternate accommodation to Mr. Tarphe. She was questioned about the documentary evidence in support of her contention, that BMC had dropped eviction proceedings but she could not produce any such documents. Nor she could prove anything to show that possession of the plaintiff was regularised.

28. The trial court also found number of defects in the evidence of architect examined by the plaintiff. But most important aspect of the evidence of architect is the map or plan filed by him along with his report showing existence of in all 24 structures for which an attempt is made by the plaintiff to get injunction in respect of all the 24 structures. Plaintiff also examined one Vijay. His evidence does not take the case of the plaintiff any further.

29. To sum up, this is therefore a case where the plaintiff has failed to establish any right in respect of the suit plot and this is a case where the plaintiff

tried to grab the entire plot along with the 22 structures without any right, title or authority without disclosing this material facts initially in the plaint because if he had disclosed there were 22 structures, then the court might not have granted injunction as prayed for in the Notice of Motion. His entire case is that officers of the BMC came to demolish his residential structure and therefore he was constrained to file suit in urgency but the case developed subsequently is for grabbing all those and get protection to 22 structures therein. This is therefore a totally false and bogus suit and the trial court was fully justified in dismissing the suit, both on merits as well as with reference to issue no.2. No interference is therefore called for and hence the order.

ORDER

30. Appeal is dismissed with costs through out. The plaintiff shall hand over the possession of the plot to BMC within two weeks.

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